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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CODY ROBERT YOUNG,

Defendant and Appellant.

E069694

(Super.Ct.No. SWF10001755)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,  
Judge. Affirmed in part; reversed in part with directions.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C.  
Cavalier and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and  
Respondent.

This case involves a fatal shooting which capped a series of confrontations between members and associates of two motorcycle clubs. Jason Schlig and Shaun Spicher belonged to the Brotherhood Motorcycle Club and defendant Cody Young was a frequent associate. The homicide victim, Todd Brown, had been a member of the Vagos Motorcycle Club and continued to associate with them, as did his then 20-year-old son, Tyler Brown.

On August 29, 2010, Jason Schlig complained to Tyler Brown about his father's treatment of Shaun Spicher during an altercation at a bar months earlier. Though their conversation was civil on the surface, it angered Todd Brown when he heard about it. He later accosted Jason Schlig and said he was making the matter a "club issue"—at least implicitly threatening violence on the part of Vagos members. Later that night, Todd Brown saw Jason Schlig and Shaun Spicher on their motorcycles and pulled a U-turn to follow them. Tyler Brown and two friends rode with Todd Brown. They caught up with the motorcycles and overtook Shaun Spicher at a stop sign on the corner of Lincoln Avenue and Palm Avenue in Hemet.

Accounts differed, but Cody Young and Shaun Spicher said Todd Brown used his truck to force Shaun Spicher to the side of the road before all four passengers got out and attacked Spicher. Cody Young pulled up behind them driving Jason Schlig's SUV and fired two shots into the air, he said to stop the fight. Todd Brown got into his truck, turned it and drove toward Jason Schlig, who was on foot across the intersection on Lincoln Avenue. Both Jason Schlig and Cody Young began firing at the truck, allegedly

to stop Todd Brown from running Jason Schlig down. Cody Young fired four rounds into the back of the truck, but stopped firing when Todd Brown turned the truck and drove west on Palm Avenue. Jason Schlig fired 17 rounds, and one of his bullets struck Todd Brown in the back of the head, killing him instantly.

A jury convicted Jason Schlig of murdering Todd Brown in the second degree, attempting to murder Tyler Brown and one of his friends, and discharging a firearm into an occupied motor vehicle. The same jury convicted Cody Young of voluntary manslaughter and discharging a firearm into an occupied motor vehicle, but acquitted him of attempted murder. The jury also found true various firearm allegations against both Jason Schlig and Cody Young. The jury acquitted Shaun Spicher of being an accessory after the fact. Jason Schlig and Cody Young appealed.

In a prior decision, we reversed the first jury's conviction of Young, holding the trial court committed prejudicial error by improperly (i) admitting evidence Young participated in an unrelated beating, which bore no similarities to the shooting, (ii) excluding evidence Todd Brown had, on another recent occasion, used his truck as a weapon against a Brotherhood member, and (iii) instructing the jury Young and Schlig had no right to defend themselves if they were the aggressors.

The People chose to retry Young on charges of voluntary manslaughter and discharging a firearm into an occupied motor vehicle, as well as the allegation he had personally used a firearm in committing those offenses. (Pen. Code, § 12022.5, subd. (a).) In the second trial, they omitted the evidence of the prior beating, but introduced

testimony of a jailhouse informant who reported to prosecutors his conversations with Young while they were housed in the same unit. The informant's testimony amounted to a detailed confession that Cody Young, together with Jason Schlig, had planned to find Todd Brown and shoot him on the night of the incident because they viewed him as a threat. The informant's testimony also indicated Todd Brown was not a member of the Vagos at the time of the shooting, and Cody Young knew that fact undercut his defense-of-another defense. The second jury found Cody Young guilty of both counts and found he had personally used a firearm. The trial court imposed mandatory firearm enhancements at sentencing.

Young appeals both his convictions and his sentence. On the convictions, he argues the trial court committed prejudicial error by allowing the jailhouse informant to testify because the informant was acting under the implicit direction of the prosecution after his first interview. We conclude the trial court did not err in concluding the informant was not acting as the prosecutors' agent in later interviews, and, in any event, any error was harmless. We therefore affirm the judgment of conviction.

Young argues we should vacate his sentence because the Legislature amended Penal Code section 12022.5, making the firearm enhancements discretionary. He argues the change applies in his case, and the People concede. We agree, and therefore vacate the sentence and remand to the trial court to consider whether to strike the enhancements.

# I

## FACTS

### *A. The People Involved and the Triggering Incident*

The shooting victim, Todd Brown, lived in Hemet with his 20-year-old son, Tyler, who was present at the shooting. Todd had been a member of the Vagos Motorcycle Club, which had a reputation for violence, but he was no longer a member at the time of the shooting.

Jason Schlig and Shaun Spicher were members of the Brotherhood Motorcycle Club. Spicher was the group's sergeant at arms. Cody Young was a friend of Schlig and Spicher, but not a member of the club. All three were present at the shooting.

In March 2010, Tyler and his friend Gregory Pearse went to a Hemet bar called Tap Daddy's. Pearse went to an exclusive upstairs part of the bar where Spicher was working security. Spicher approached Pearse and told him he had to leave because the area was reserved for VIPs. According to Pearse, Spicher was threatening. Pearse left the bar, found Tyler outside, and told him what had happened. Tyler called his father, who came to the bar looking for Spicher and confronted him in the parking lot. The witnesses' stories conflict, but an altercation ensued in which Todd punched Spicher and other people engaged in minor fistfights. After the fight ended, Todd, Tyler, and Pearse left.

### *B. The Day of the Shooting*

On August 29, 2010, Tyler and his friend Karl Rogers walked to a gas station near Tyler's home to buy items at the convenience store. Schlig was there with his girlfriend,

Lindsay Robinson. Schlig approached Tyler and told him he and his friends were still angry about the fight at Tap Daddy's. Tyler told Schlig he would report what he'd said to his father and walked home.

When Todd heard about the incident he got angry. He drove over to the home of a friend of Schlig's. Schlig came outside and he and Todd had a verbal confrontation. Todd told Schlig if he messed with Tyler again he would "own [Schlig's] motorcycle." Todd said he was making their conflict a "club issue," so Schlig should call his sergeant at arms, who was Spicher. Schlig tried to call Spicher, but didn't get him. Meanwhile, Todd got back in his truck and left.

Schlig went to Spicher's house because he was upset by the confrontation. Spicher said he was moving on the day of the shooting, and Young was there to help drive things to the new home using Schlig's SUV. Spicher said he felt he needed to investigate the incident, so he and Schlig left to ride over to the friend's house. Young followed in Schlig's SUV.

At around 8:00 p.m., Todd, Tyler, and their friends left Todd's house again. They were driving south on Lincoln Avenue when they saw Schlig and Spicher riding their motorcycles. When they drove north on Lincoln, Todd pulled a U-turn to follow them. He caught up with Spicher at the intersection of Lincoln and Palm. Schlig already had crossed. Tyler said Todd stopped his truck near Spicher, and they exchanged words. According to Tyler, it looked like Spicher was going to open the door. Spicher said Todd's truck had swerved at him and cut him off at the intersection.

Todd got out of his truck, went over to Spicher and punched him. Tyler, Rogers, and Pearse joined the fight. During the scuffle, Young pulled up behind Todd's truck in Schlig's SUV. Young had a gun and fired two shots he characterized as warning shots. Tyler said Young fired toward them and the truck. Todd yelled there was a gun, ran towards his truck, and told the others to run. Tyler and Pearse ran, but Rogers was stuck on the ground underneath Spicher. Todd got in his truck and began to drive away.

According to Young, Todd drove directly at Schlig, who was off his motorcycle and standing across the intersection. Schlig began shooting at the truck. Young then fired four gunshots at the back of Todd's truck, he said because he thought Todd was trying to run down his friend. When Todd's truck turned onto Palm Avenue, Young stopped shooting, but Schlig continued.

At approximately 8:30 p.m., police arrived at the scene. They found Spicher with a disabled motorcycle. Todd was in his truck in a field with the motor running. Two of Schlig's shots had hit Todd, one fatally in the back of his head.

Shortly after the shooting, Lindsay Robinson picked up Schlig and took him to her home. Young arrived later. The two bragged about the shooting. Young said he had gotten down on one knee the second he saw Schlig firing, and fired four rounds. Though she didn't recall it at trial, Robinson told an interviewing detective Schlig told Young, "You proved yourself to me, Brother."

The police located and arrested Schlig, Robinson, and Young over the ensuing two weeks.

C. *Young's Statements to Another Inmate*

From June to September 2011, Young was in administrative segregation in county jail, where he discussed his case with a fellow inmate (the informant). Young told the informant he and Schlig had been looking for Todd to “deal with him and shoot him.” Among other things, he said he wanted to have Schlig’s girlfriend, Lindsay Robinson “whacked” or otherwise neutralized because she could testify against him. The informant, who had previously been a paid informant for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), asked his attorney to arrange a meeting with prosecutors so he could report on Young.

1. *The August 18, 2011 Interview*

On August 18, 2011, the informant met with an attorney and an investigator from the Riverside County District Attorney’s Office. Before the interview, he signed an agreement with the prosecutors stating they hadn’t agreed to give him anything in return for the information he would provide them. He characterized the agreement as meaning “there’s no promises made to me regarding my current situation, my case, . . . testimony or . . . information I’m about to give.”

The informant said he asked to speak to the prosecutors primarily because Young had told him about plans to harm a witness in the case. “This pertains to his case and, um, some witnesses in the situation pertaining to, um, this female witness on his case. About, ah, her life’s in danger, her—her safety, her freedom. Um, that there—there are plans in the work—works on his end, his people’s end and possibly on my end as well.



This is what I've led him to believe, anyways, that, ah, she would be taken care of. Either—they're either gonna hit her, um, make her disappear, [make her] an offer she can't refuse[,] or set her up so she gets busted with narcotics so her credibility as the witness against Mr. Cody Young is squashed." He identified the witness as Lindsay Robinson, Schlig's girlfriend, and explained that when he said Young intended to "hit her," he meant "[h]ave her killed."

The informant said Young also admitted he and Schlig were looking for Todd on the night of the shooting and intended to kill him. According to the informant, Young said, "he was gonna help homeboy take care of his business and, ah, it, he really, at first, he said he had the gun on him, it wasn't a planned thing at the beginning, but something happened that day that they said yeah, we're gonna go get this guy. I don't know, I couldn't even tell you that dude's name, but we're gonna go get this guy, I guess." Young said, "Oh yeah, we're gonna whack him. Someone was getting killed. Some, there was gonna be retaliation for somebody coming over and disrespecting the brotherhood." He said, "It wasn't Cody's beef. Like they weren't coming at him, it was nothing personal with Cody, but Cody's gonna stand with his friends and his family or the brotherhood and basically whatever they want, he's gonna do it and he, it doesn't matter. Right or wrong, they'll discuss that later, that's how usually gangs work." According to the informant, Cody said they found Todd and shot him. "[T]hey both fired, but, um, he didn't tell me how many times he hit the guy, you know, firing, but he

was pretty confident, kind of bragged and smiled ‘cause we’re both kind of on that same page where screw the Vagos.’”

At the end of the interview, the informant asked his interviewers whether they wanted to give him any direction about additional questions. He said he didn’t ask Cody follow-up questions about the location of the guns he and Schlig used “because I wanted to wait to see if I was gonna, you know, be able to speak to you all and see if there’s any direction or any points that you could say . . . could you find out what kind of guns they were . . . could you ask him, maybe he’ll open up to you and tell you where they’re hidden.” The interviewer responded, “Well, I mean, at this point, we can’t give you any direction,” then said, “Let’s, ah, leave it at we just can’t.”

The interviewer asked the informant why he asked his attorney to contact them. He responded, “it’s pretty, deep, it goes back to my past involvement with, ah, with illegal illicit activity. I, ah, my time in prison, um, my, when I became a born again Christian, when I gave myself to God, um spiritual, karma, I don’t wanna see anybody hurt anymore. And I didn’t go looking for this, so to say, but a lot of stuff’s brought to me and I really have no choice to not have to share it with law enforcement, with you guys, my attorney’s saying, hey, you know, let’s do—do something, get a word to these guys or whoever’s working on Cody Young’s case that somebody could—someone could get hurt, you know, that’s it. That’s my motivation.” At that point, the interview ended.

## *2. The August 24, 2011 Interview*

At the informant's request, the district attorney's office interviewed him again six days later. At the outset, the district attorney reiterated they had not agreed to give him anything in return for his information, and the informant confirmed that fact. He also confirmed the district attorney had not told him to try to get more information and hadn't given him any guidance about doing so. He said he asked his attorney to contact the district attorney because Young had "opened up. In fact, he's opened the floodgates up . . . [and] he's basically told me who, what, where, how, why."

Young had told the informant the whole story. He said Young told him "the reason the shooting happened, ah, [the] people involved. Ah, what led up to it the night in question . . . [H]e's told me about a codefendant named Shaun, who was a Marine, who is now in custody. Who was arrested at the scene. Um, he tells me how the victim, um, the guy that got shot was a . . . Vago, his name's Todd. Ah, he tells me about how the guy almost ran him over, well not him, Cody was driving, ah, Jason's vehicle. Um, how one of the guys, ah, both guys on motorcycles, one was Jason and one was Shaun, they were on motorcycles. I guess Todd came out of nowhere, tried to hit one of them or cut them off, something like that . . . [A]nd that's when the gunfire started. Um, he tells me how it led up to it that before that happened, I believe it was Jason and Shaun, it was either both of them or one or the other, ran into the . . . Vago Todd, the guy that got killed, his son at a gas station. His son's name's Ty, had words with him, maybe they were threatening words, I don't know. . . . He said they got into an argument or whatever

. . . Later on, I guess Todd, the Vago guy, went over to where Jason was. I don't know if it's Jason's house or where Jason was hanging out. . . . Todd comes up and starts screaming and yelling, about he's a punk ass, and stay away from his family and he should beat his ass and take his patch and steal his motorcycle. And Cody tells me these guys are scared of this guy, Todd. He's a Vago, I guess he's older. . . . Cody said . . . Jason and Shaun peed on themselves. But the original why these guys had words, it goes back . . . to a bar fight . . . Big Daddy's or Daddy-O's, it's a local bar. Shaun, which is the Marine, soon to be ex-Marine . . . Shaun got beat up by Todd, the Vago. So there's the hard feelings, these bike[r]s and their, you know, alcohol, pride, whatever . . . Enter the gas station incident, picking on Todd's son, Ty. Ty telling his dad, his dad going back over to Jason and Shaun and I guess confronting about the incident. Cody tells me he didn't think it was that big of a deal, but he got a call. Cody said he did show up, he was strapped, that's Cody's words, ah, for carrying a gun."

According to the informant, Cody then explained how they began hunting Todd Brown. "Cody says yeah, ah, Jason's calling a bunch of people up. I don't know any names, I don't know these people, but he's calling people pumping up, hey, this is turning into, first it was just a personal beef at a bar, whatever, now it's turning into club business. Todd's showing up at people's houses, calling the brotherhood, the biker gang, a bunch of punks, weak, ah, and Vagos, and they, they're—they got a reputation as it is . . . So Cody was telling me this is starting to become reality, you know, okay, maybe this is gonna happen. And, ah, Jason was pretty adamant about . . . bringing it to their

doorstep, that's his terminology, bringing it, going and finding them. Not letting his house get shot up or his family or innocent people getting hit, you know, at the pad. So Cody tells me Jason is the one that produced, is the one who gave the guns, nine millimeters . . . [A]lso flak jackets, bullet proof vests." Cody said, "'Man, I didn't really think it was gonna come to this until the point where, ah, the flak jackets and the guns.' But he said he's gonna be, he said, 'Someone was gonna die that night and it's not gonna be one of his fucking brothers.' . . . And he will bring it to their doorstep and he has no problem shooting this dude or these dudes." He summarized, "Basically, they were gonna patrol the neighborhood because they had seen activity of Todd or Todd's homeboys, Vagos in general, cruising the neighborhood."

The district attorney asked the informant whether Young said they went out patrolling and Todd just showed up. He replied, "Yeah, he says he was behind them, you know . . . he was close enough where he seen Todd's truck almost run over Shaun, you know, while Shaun was on a motorcycle. He said . . . Todd came out of nowhere and tried to fucking hit dude on his bike. . . . He said he came out of nowhere and that's when the shit hit the fan. Dude puts his bike down, guy got out of the truck, Jason got out of, off his motorcycle, dude turned around and tried to get back into his truck. Jason starts dumping on him, Cody said, Cody starts firing."

### *3. The September 22, 2001 Interview*

A month later, the informant asked for another interview with the district attorney's office. The district attorney reiterated their prior position that he would

provide them information but they “can’t make any promises today[,] but . . . nothing you say will be used against you in any way.” He agreed.

The informant said he wanted to make some corrections to his previous statement. He said he’d learned Todd had withdrawn from the Vagos and that Young and his codefendants “do not want the DA or anybody to be—to have knowledge of Todd’s standing because it’ll effect or, um—a couple of Cody’s codefendants are—this what Cody has told me honestly how all these people never seen ‘em that, uh, their defense in this execution killing of Todd is going to be self-defense because of the Vagos.” He explained, “If Todd came over that house whoopin’ that now its club this—this that their getting’ the, uh, Vagos involved and whoop-whoop-whoop. That would be pretty scary. But the fact of the matter is the guy didn’t have any pull. Turns out that these people in—that I think in prior, um, previous, um, interviews I might have stated that there was people cruisin’ by Todd or Jason’s house. Cody corrects and he says, ‘Look it’ he says, ‘There was maybe one or two people and it was Todd’s relatives no bikers.’” He said he had told Young “it’s pretty balsy goin’ after a Vago and you’re gonna go whack ‘em, you know? And especially when they know you and they know your family know where you live.’ And that’s when he tells me about the dude rollin’ his patch up.”

In connection with the plan to kill Todd, the informant gave additional detail. “[H]e said [it] was Jason [who] supplied the weapons, um, they knew where . . . Todd was gonna be and the plan was bein’ on motorcycles ‘cause—‘cause they’re very loud and they’re bikers they know. They’re already . . . on edge because of the incident

earlier. They were gonna . . . cruise by his house or wait—I don’t know if it was his house or someplace they knew he was gonna be and pull ‘em out—get ‘em out of there and have them come to them. To have him come to them, you know? And that’s when they were gonna whack ‘em they’re gonna kill ‘em.” According to the informant, Young “said when [Todd] comes up to ‘em—he’s gonna turn that’s when . . . Sean is gonna try to either block ‘em off or get close to the vehicle . . . and they’re gonna take care of business and that business is they got the Suburban Cody with the hand gun and an assault rifle and they’ve got Jason with the hand gun on a bike—two bikes—one vehicle. And, uh, they—they did exactly what they were plannin’ on doing. The vehicle stopped. They got out there was some words there some blows exchanged because Sean got punched a couple times—out come the guns. Targeted Todd.”

#### 4. *Young’s Motion to Exclude the Informant’s Testimony*

Ultimately, the prosecutors did not present the informant’s testimony at Young’s first trial. However, after we reversed the first verdict against Young, they approached him again to see whether he remembered what Young had told him. He did, and the prosecutors decided to offer his testimony at Young’s second trial.

Young challenged the admissibility of the informant’s testimony. He argued the testimony, among other things, violated his right against self-incrimination because his discussions with the informant after the first interview amounted to prosecution-guided questioning without the benefit of counsel. Outside the presence of the jury, the trial court heard the informant’s testimony about the nature of his communications with the

prosecutors. He said he was awaiting sentencing on a conviction for robbery involving the personal use of a firearm when he gave the three interviews to the district attorney's office. He said his sentencing was postponed so he could gather more information on Young which would allow him to work out a deal. He said he understood he could gain a reduced sentence.

On cross-examination, however, the informant said several times the district attorney and investigator he met with never gave him instructions about what to ask Young. He also said neither the district attorney nor the investigator ever conveyed an offer of a reduced sentence for cooperating. The prosecutor asked whether his "going back and getting information from Mr. Young was all of your doing and no—there was no agreement with you that you were" doing so "in order to get a benefit?" He responded, "Yeah. There was no agreement. No direction."

The trial court determined the informant's testimony was admissible and did not violate Young's constitutional rights because he was not acting as an agent of the prosecutor when he spoke with Young. "His conduct was based on his own free will, own perceptions about what could help him in his own prosecution. It was not as a result of any State action. That is, there were no direct or even implied suggestions on the part of the prosecutor for [the informant] to gather additional information and continue to speak with Mr. Young while he was represented by counsel. So, there's no evidence that would suggest that he . . . was acting as a State agent. [¶] The only evidence I have was that he was acting as a creature of free will with the hope he would get some favorable



treatment from the prosecutor's office if he provided favorable information. So the renewed motion to exclude [the informant's] testimony . . . is denied."

### *5. The Informant's Trial Testimony*

In his testimony to the jury, the informant repeated most of what he told the district attorney's office during the three interviews conducted in 2011.

He told the jury he met Young in the summer of 2011, while both were housed in the administrative segregation section of the Riverside County jail. He said he and Young talked frequently during that period, and Young began confiding information about his case. Early on, Young brought up codefendant Jason Schlig's girlfriend, Lindsay Robinson, said she had damaging information, and asked for the informant's help having her "whacked." He said Cody "was kind of all over the place, not with . . . one plan in general. Everything from maybe having her disappear—not so much getting her hurt, but maybe getting her—making her disappear, maybe getting her to run or something. She's a heroin addict, a drug addict, methamphetamine, stuff like that. So there's ways to, you know, get somebody on your side or not for her to testify, but he was worried about her surfacing somewhere." The informant said the threat to Robinson was one of the primary reasons he reached out to law enforcement through his attorney.

The informant also told the jury of two admissions by Young that undercut his claim he shot at Todd only to defend himself and others. First, Young told him Schlig had gathered people together to go out and patrol for Todd with the intention of killing him. Initially, Young told the informant he was acting in defense of others when he shot

Todd. But it came out “[t]hat was not the truth. And the story changed pretty dramatically to a—a random act. They were there at the wrong place/wrong time, something like that, to a seek out, find, and—and they put harm on this man.” According to the informant, Young admitted they went out “on patrol” that night “[t]o find Todd . . . [and] deal with him,” meaning “take [him] out, to shoot.” Young said, “they knew where [Todd] was at, you know, [the] area, and they were going to drive around and kind of force him out, flush him out,” by trying to get his attention with the noise of their motorcycles. “[T]hey were patrolling, looking for Todd for one reason and one reason only. And Cody, you know, he told me he was armed and he had a bulletproof vest . . . [A]nd Jason was armed as well.” Young told the informant his job was to stay right behind the motorcycles in the SUV. This testimony has additional detail, but largely tracks what he told the district attorney in his first interview in August 2011.

Second, Young told informant Todd wasn’t a Vago at the time of the shooting and didn’t have any pull with the gang. Further, Young said he didn’t want the prosecution to learn this fact because it would undermine his claim that they were armed to defend themselves and shot at Todd only in self-defense or defense of another. Young told the informant it would be crazy to take part in the killing of an active Vago. However, on cross-examination, the informant said Young didn’t say when he learned Todd was no longer a member of the Vagos. This portion of the informant’s testimony came from conversations he had with Young after his first interview with the district attorney.

The informant said he didn't receive a deal from the prosecutors and, indeed, that he didn't seek a deal. The prosecutor asked, "Did you have conversations with your attorney back then about what might happen for sharing information?" He responded, "No." The prosecutor asked, "Why not?" He responded, "I wasn't initially even—when the offer was made, I wasn't looking for a deal. I didn't think this would go this far. I gained information for one reason only. [¶] When he started, you know, talking about this incident, the bragging and the girl possibly getting whacked or killed, I had to come forward with the information. The initial offer was made for possible—possibly, 'If we need you to testify, will you do this?' [¶] 'No.'" He said he discussed with his attorney an offer to seek a sentence of 17 years with half-time credit for testifying at a hearing in October 2011. But the offer went no further than discussions between the informant and his attorney. He never received an offer in written form, and, when negotiations were broached, he said, "I'm not going to take a deal." He told prosecutors he didn't seek a deal because he "didn't want to interfere with the sanctity of the case."

On cross-examination, the informant admitted he asked about a deal when the district attorney's office renewed discussions with him in 2017. He said he asked whether he would be "getting the same deal" that had been under consideration in 2011. The prosecutors told him they didn't know about a prior deal and ultimately told him there wouldn't be a deal because he had already been sentenced and they couldn't recall a final sentence.

D. *The Verdict*

The jury found Young guilty of voluntary manslaughter (Pen. Code, § 192, subd. (a), unlabeled statutory citations refer to this code) and discharging a firearm at an occupied motor vehicle (§ 246). The jury also found Young had used a firearm in committing the offenses. (§ 12022.5, subd. (a))

The trial court sentenced Young to 16 years in state prison, a sentence consisting of a mid-term six years for manslaughter and a consecutive upper-term 10-year firearm enhancement. The court stayed the sentence for discharging a firearm at an occupied motor vehicle and the associated firearm enhancement (§ 654).

Young filed a timely appeal.

## II

### ANALYSIS

A. *Testimony by Jailhouse Informant*

1. *Admissibility of jailhouse informant testimony*

Young argues the trial court violated his Fifth and Sixth Amendment rights by allowing the informant to testify about his conversations with Young while they were in jail. He argues the informant's questioning was improper because Young was represented by counsel and the informant was working under the direction of the district attorney's office. The trial court found the informant was not acting as an agent of the prosecution and permitted him to testify.

“[W]hen, after adversarial judicial criminal proceedings have been initiated and in the unwaived absence of counsel, a government agent deliberately elicits from a defendant incriminating statements, those statements are inadmissible at a trial on the charges to which the statements pertain. [Citations.] Such a Sixth Amendment violation occurs when the government intentionally creates or knowingly exploits a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, but not when the government obtains such statements through happenstance or luck. [Citations.] “Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements.”” (*People v. Dement* (2011) 53 Cal.4th 1, 33 (*Dement*), abrogated on another ground by *People v. Rangel*, 62 Cal.4th 1192, 1216.)

“Where the informant is a jailhouse inmate, the first prong of the foregoing test is not met where law enforcement officials merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance.” (*In re Neely* (1993) 6 Cal.4th 901, 915.) The parties therefore agree the informant was not acting as a government agent when he spoke to Young before his first interview, and the information he provided in that interview was admissible at trial. The question is whether he went back into the jail at any time after the first interview having become a government agent. To show the answer is yes, Young must provide evidence

the informant and the district attorney's office entered an arrangement whereby the informant expected some benefit from going back and deliberately eliciting incriminating statements from Young.

Such an arrangement "need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct' over time." (*In re Neely, supra*, 6 Cal.4th at p. 915.) Here, there is no evidence of an explicit agreement and insufficient evidence from which to infer an agreement. We start with the statements contained in the transcripts of the interviews themselves. Before the interview, the informant signed an agreement with the prosecutors stating they had *not* agreed to give him anything in return for the information he would provide them. At the interview, the informant said he understood their agreement to mean "there's no promises made to me regarding my current situation, my case, . . . testimony or . . . information I'm about to give." At the end of the first interview, he asked his interviewers whether "there's any direction or any points that you could say . . . could you find out what kind of guns they were . . . could you ask him, maybe he'll open up to you and tell you where they're hidden." The interviewer refused to provide direction. The interviewers then revisited the agreement and refused to give instruction in subsequent interviews. He confirmed all of this at trial.

Moreover, the informant affirmatively denied he was providing the information to get a deal. At trial, the prosecutor asked whether he had questioned Young "for the purpose of getting a deal from the district attorney." He responded, "Negative."

According to the informant, he spoke with the prosecution because he wanted to do the right thing. Even if you don't credit that testimony, there is little evidence to indicate the government was exercising any kind of control over the informant. Contrary to Young's position, we cannot infer agency from the fact that the district attorney asked him specific questions at the first interview. The most natural interpretation of the evidence is that he hoped he might get some benefit in his impending sentencing by being cooperative, and he chose to pursue that strategy on his own. He was, after all, an experienced ATF informant. That's the conclusion the trial court reached, and it is fully supported by the transcripts of the interviews and the informant's trial testimony about his relationship with the district attorney's office. But acting out of *hope* that a benefit may be granted is not acting to satisfy "a *preexisting arrangement*, with the *expectation* of some resulting benefit or advantage." (*Dement, supra*, 53 Cal.4th at p. 33, italics added.) As a result, the trial court did not err in concluding the informant was not acting as an agent of the district attorney's office.

Our conclusion might have been different if there were some evidence the informant and the district attorney had additional communications outside the interview at which they communicated their desire for him to go back in and probe Young for more information. But Young points us to no such evidence. Similarly, our conclusion might have been different if there were evidence the informant had gleaned from verbal or physical cues that the district attorney was in fact implicitly agreeing to provide a benefit in return for further information. But again, Young has not pointed us to any such

evidence. On the contrary, when asked whether he understood there to be any such agreement, the informant responded in the negative. We are left to conclude, as the trial court concluded, that the informant was acting as his own agent. The trial court therefore did not err by admitting his testimony.

## 2. *Prejudice*

We also conclude it was not prejudicial to admit the informant's testimony reporting information he obtained after first talking to the district attorney's office. (*Chapman v. California* (1967) 386 U.S. 18, 36.) If admitting the testimony was error, it was a "trial error" which is "amenable to harmless error review because [it] can be 'quantitatively assessed in the context of other evidence presented in order to determine whether [its] admission was harmless beyond a reasonable doubt.'" (*People v. Aranda* (2012) 55 Cal.4th 342, 363.)

The informant offered two critical portions of testimony which undermined Young's claim that he acted in defense of himself and Schlig. First, he testified Young admitted he and Schlig were out patrolling for Todd Brown on the night of the shooting, and intended to shoot him. Second, he testified Young told him Todd Brown was not a member of the Vagos at the time of the shooting, and admitted he knew that fact to be damaging to his defenses. Admitting these portions of testimony was not prejudicial for different reasons.



Admission of testimony on the first point was not prejudicial because Young had admitted he and Schlig set out to find and shoot Todd Brown before the informant's first interview with the district attorney's office. According to the informant, "Cody was telling me this is starting to become reality, you know, okay, maybe this is gonna happen. And, ah, Jason was pretty adamant about . . . bringing it to their doorstep, that's his terminology, bringing it, going and finding them. Not letting his house get shot up or his family or innocent people getting hit, you know, at the pad. So Cody tells me Jason is the one that produced, is the one who gave the guns, nine millimeters . . . [A]lso flak jackets, bullet proof vests." By that point, Young realized they were going out to kill Todd Brown. Young "said, 'Someone was gonna die that night and it's not gonna be one of his fucking brothers.'" According to the informant, Young admitted "they were gonna patrol the neighborhood because they had seen activity of Todd or Todd's homeboys, Vagos in general, cruising the neighborhood." Since the informant obtained this information before ever speaking to prosecutors, testimony based on it was admissible. Even if the government had enlisted his aid after that first interview, what he learned later on at this point was only detail. The crucial information fell into the prosecution's hands, contained significant detail, and was admissible. It therefore renders harmless the introduction of testimony about additional details of the plot which the informant learned later.

Admission of testimony on the second point was not prejudicial for two reasons. First, there was other uncontested evidence Todd Brown was not a member of the Vagos at the time of the shooting. Tyler Brown testified his father had been a member of the Vagos, but had left the group. No one presented evidence he remained a member. Thus, allowing the informant to testify Young knew that fact when he was in custody for the killing added nothing. Second, the testimony is not damaging unless Young had admitted he knew at the time of the shooting that Todd Brown wasn't a Vago. But the informant testified he had no idea when Young learned Todd Brown had left the Vagos. Young didn't tell him when he learned that fact. Thus, the jury already knew what the informant told them in that portion of his testimony, and standing on its own, the fact was a minor revelation. Young's stated concern that the fact would make it difficult to convince the jury that he had acted in reasonable fear of Todd Brown and his former motorcycle club members is an interesting, but ultimately, unimportant detail, which tells us only about Young's state of mind as he contemplated trial, not his state of mind when he became embroiled in these events.

We therefore conclude, even if it were error to allow the informant to testify about what he learned from Young after the first interview with prosecutors, admitting his testimony was harmless beyond a reasonable doubt.

### *B. Firearm Enhancement*

Both parties contend we should reverse Young's sentence and remand to allow the trial court to exercise its newly minted discretion to strike the firearm enhancements under amended section 12022.5. We agree remand is required.

At sentencing, the trial court imposed a mid-term six-year sentence on the manslaughter conviction and imposed a consecutive upper term 10-year enhancement for using a firearm. The court also imposed and stayed a mid-term sentence of five years for the conviction for discharging a firearm at an occupied motor vehicle and imposed a mid-term firearm enhancement (also stayed) on that count. Under former section 12022.5, the firearm enhancements were mandatory. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1082.)

Effective January 1, 2018, the Legislature amended section 12022.5 (see Senate Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682), making its firearm enhancements discretionary. The amended statute allows the trial court to strike or dismiss such enhancements in the interests of justice under section 1385. Because Young's conviction and sentence were not yet final when the amendment took effect, the change applies to his case. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Consequently, we will remand for resentencing so the trial court may exercise its statutory discretion. (*People v. Billingsley, supra*, 22 Cal.App.5th at p. 1082.)

### III

#### DISPOSITION

We affirm the judgment of conviction, but vacate Young's sentence and remand for the trial court to exercise its discretion under section 12022.5, subdivision (c).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH  
J.

We concur:

McKINSTER  
Acting P. J.

CODRINGTON  
J.